SUPREME COURT, U.S.
Supreme Court, U.S.
FILED
DEC 9 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

October Term, 1971

No. 71-630

71-631

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA and HON. JESSE W. CURTIS,

*Petitioners,*

*vs.*

COURT OF APPEALS FOR THE NINTH CIRCUIT, ROSALIO U. MUNOZ and MICHAEL E. TIGAR,

*Respondents.*

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**Respondents' Opposition to Motion for Leave to File and Petitions for Writs of Prohibition and Certiorari.**

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## Respondents' Opposition to Motion for Leave to File and Petitions for Writs of Prohibition and Certiorari.

### Introduction and Summary.

Respondents Muñoz and Tigar, the real parties in interest herein, respectfully oppose the granting of the motion for leave to file petition for a writ of prohibition and the granting of a writ either of prohibition or of certiorari in this case.

As the argument will show, the petition for certiorari is untimely for reasons which the record below reveals. Moreover, the petitioners' own argument demonstrates why the extraordinary remedy of prohibition should not be available to further prejudice respondent Muñoz's right to a speedy trial.

Turning to the merits, the respondents argue in the alternative: The principal issue presented by petitioners does not clearly emerge from the tangled record below, which produced a relatively commonplace decision on a relatively minor point of statutory construction. If, however, this Court believes the case must be heard, respondents suggest that the issues mentioned at page 15 of the petition for certiorari be given pride of place in plenary hearing: the sixth amendment right of every federal criminal defendant to counsel of her or his choice;* the right of counsel confronted with an admission proceeding to a fair hearing on her or his alleged "unfitness," and the denial of equal protection of the laws and due process of law by a system of rules for admission to a federal court bar (*pro hac vice*, in this case) which irrationally prefers "nonresidents" to "residents". There are also first amendment issues to be considered here.

**The Petition for Certiorari Is Untimely.**

The petitioners' recital of the relevant dates is in error. The actual facts are these: The petition for writ of mandamus was filed in October 1970. The Court of Appeals entered an order concerning it on December 17, 1970 (Petition, App. A). The Court of Appeals denied the petition for mandamus, but entered an order adopting a construction of the district court rule favorable to petitioners (Respondents in this Court), on March 17, 1971 (Petition, App. B). Tigar and Muñoz, with this order, went before Judge Curtis on

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*Although California's Supreme Court has by a decisive opinion declined to take a role in setting qualifications for federal practice (as we note below), petitioners' counsel are apparently engaged by the California State Bar, a statutory body.

March 22, 1971, and the judge denied Tigar's application (Petition, App. E).

Tigar and Muñoz then filed a "Petition for Rehearing and, In the Alternative, Motion for Enforcement of the court's order." The Court of Appeals, one judge dissenting, treated this paper as a motion to enforce the March 17, 1971, order, and granted said motion on April 21, 1971 (Petition, App. C).

The district judge, Petitioner in this Court, then filed a "Petition for Rehearing" of the April 21, 1971, order, which was denied August 9, 1971. Tigar and Muñoz maintained in the Court of Appeals, and repeat here, that Judge Curtis' complaint, if any, was with the March 17, 1971, order, and that his May 5, 1971 petition for rehearing was untimely.

The order of April 21, 1971, merely enforced the March 17 order, and the district judge did not file a petition wthin fourteen days from March 17. He must, therefore, be taken to have waived objection to it in the Court of Appeals.

More importantly, the time for filing a petition for certiorari began to run on March 17, 1971, not later, since only a timely petition for rehearing suspends the running of time.

This point is important here because the dilatory tactics of Petitioners prevented Muñoz's criminal case, in which the charge is an induction refusal allegedly committed in 1969, from being tried.

Furthermore, in not raising in a timely fashion the objections petitioners now recite, the Court of Appeals could not have considered those arguments in reaching its April 21, 1971 decision on the appropriate construction of the rule.

**The Petition Discloses Why a Writ of Prohibition Should Not Be Entertained.**

Mandamus, says the Petition, was improper in this case, and the Court of Appeals should not have used it. Yet another extraordinary writ is being sought in this Court.

Respondents contend that mandamus was proper below and that prohibition should be refused in this court.

1. Mandamus under the All Writs Act may be granted whenever the Court of Appeals will eventually have power to review the respondent court's judgment. Use of the writ involves questions not of power but of prudence. *Roche v. Evap. Milk Ass'n,* 319 U.S. 21, 25 (1943): *LaBuy v. Howes Leather Corp.,* 352 U.S. 249, 255 (1957).

This Court is asked to review a *prudential* judgment not an excess of jurisdiction, so prohibition is not available.

2. Mandamus lies to correct an "abuse of discretion," *LaBuy, supra,* at 257, to redress a denial of constitutional right when there is no adequate remedy by appeal, *Beacon Theaters v. Westover,* 359 U.S. 500 (1959), and to compel performance of a ministerial duty. The argument below, under "The Constitutional Issues," discloses ample ground for the Court of Appeals' use of the writ. The original petition by Muñoz and Tigar in the Court of Appeals also discloses such grounds, as does the Court of Appeals March 17, 1971, order.

3. The use of extraordinary writs by a criminal defendant to vindicate a claimed right is looked upon with some disfavor due to the policy against piecemeal

appeals in criminal cases. See *United States v. DiBella*, 369 U.S. 121, 125 (1962). However, the use of such writs at the behest of government or court, against the will of the defendant, is conceivable only in the rarest of cases, since such use deprives the defendant of a speedy trial and frustrates the federal policy that only the defendant (not the government or the court) can take an appeal in a criminal case except as the Criminal Appeals Act provides. See *United States v. Will*, 389 U.S. 90 (1967). Hence, while the Court of Appeals may properly use mandamus to prevent an injustice to Muñoz, this Court ought to hesitate long before considering on the merits a proposal to issue a prohibition.

4. The issues here are not yet ripe. The district court will soon issue a new rule (see Petition, App. E, pp. E-20, E-21), and the Court of Appeals will perhaps be faced with a challenge to that rule. The opinions below decide nothing except how the word "or" in the present rule should be read.

The considerations adduced above also militate, respondents suggest, against granting the petition for certiorari.

**The Constitutional Issues of Right to Counsel and Due Process.**

In their petition for mandamus to the Court of Appeals, Petitioners urged upon the court both broad and narrow grounds of decision. If a certiorari is granted, and the whole record brought into this Court, respondents suggest that the following issues be framed.

1. Whether a federal criminal defendant has an absolute right to counsel of her or his choice if that

counsel is a regular member of the bar of the Court of Appeals in which the District Court is located, and/or a member of any Federal District Court Bar, and/or a member of the bar of any State, and/or a member of the bar of this Court. Whatever the wisdom of requiring state bar membership in the state in which the federal court sits as a condition to practice in diversity cases (where there are state law issues), the right of a federal question litigant should not be so confined. A criminal case raises Sixth Amendment issues in this regard. Since Andrew Hamilton came to New York to represent Zenger, there has been a feeling that the local coterie of lawyers may sometimes be of questionable value to a defendant.

Several courts have considered this question and have reached the result suggested here. See *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir. 1970); *Lefton v. City of Hattiesburg*, 333 F.2d 280 (5th Cir. 1963); *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968). Compare *Sperry v. Florida*, 373 U.S. 384 (1963).

The petition for certiorari badly misstates the California and Ninth Circuit law on this point. *Wasserman*, cited at pages 12, 15 and 16 of the petition, dealt with a regular and not a *pro hac vice* admission.

Of course, States will continue to be the primary licensing bodies for lawyers. Then, lawyers will become members of their local federal bar, as residents perhaps. But they should, respondents suggest, be free to practice in other federal district courts (as they are, by the new Rules of Appellate Procedure, free to practice in all Courts of Appeals). Of course, there

may be a requirement to associate "local counsel," and respondents herein have always been ready to do this.

California recognizes this principle, and Judge Curtis' remark at pages 2-9 and E-20 (App. E to Petition) is in error. California courts have consistently held that a person may practice in federal courts, live in California, have an office in California, and *never* become a member of the California Bar, all without violating any rule of California law. See *In re McCue,* 211 Cal. 57, 293 Pac. 47 (1932); *Cowen v. Calabrese,* 230 Cal. App. 2d 870.

More recently, a California court has admitted respondent Tigar to practice *pro hac vice* in a *state* criminal case. *People v. Angela Y. Davis,* Marin Co. Superior Ct.).

2. The petition darkly suggests that Judge Curtis was "reliably informed of affirmative misconduct by Tigar." Petition, page 16. The statement underscores an ugly aspect of this case. There has never been a hearing at which this "reliable information" has been subjected to cross-examination or even to public view. The "Seattle incident" is now in the law books in the opinion of the Court reversing the contempt convictions. *United States v. Marshall,* No. 26,889 (9th Cir., Nov. 18, 1971).

Respondents will not tax the Court's patience with a defense of Tigar's professional record as lawyer, law professor, author and Visiting Fellow of the Center for the Study of Democratic Institutions. Tigar is, quite simply, Muñoz's choice as counsel. He is a member of the Ninth Circuit bar, of the District of Columbia Bar, and has practiced in many courts. If petitioners

want to blemish his reputation and keep him from practice they should hold a fair hearing. See *Greene v. McElroy,* 360 U.S. 464.

3. The Local Rule, as quoted at pages 8-9 of the petition, establishes a distinction between residents and non-residents. Residents of the Central District who are not members of the California Bar may not practice in the district court; non-residents may practice.

If the rule seeks to ensure that those living in California become members of the California bar before practicing in federal court, it is plainly under inclusive with respect to its purpose.

If the rule seeks to ensure that litigants are represented by lawyers with a knowledge of California law, it makes no sense whatever. The "local counsel" requirement is not in issue here. There is simply no basis for saying that Muñoz could have a lawyer who lives in Kankakee, Illinois, but not one who lives in Los Angeles or Santa Barbara, California.

The rule therefore violates due process of law as being irrational and based upon an improper classification. See *Shapiro v. Thompson,* 394 U.S. 618 (1959).

4. The defense in this case is sponsored by the Mexican-American Legal Defense and Education Fund. Muñoz, an indigent, would otherwise have to rely on appointed counsel. Two issues emerge: first, appointed draft lawyers in Los Angeles may or may not be adequate, *United States v. Norman,* 413 F.2d 789 (1969); second, there are important first amendment questions here. See *NAACP v. Button,* 371 U.S. 415 (1963); *UMW v. Illinois State Bar,* 389 U.S. 217 (1967).

## Conclusion.

For the foregoing reasons, the motion for leave to file a petition for Writ of Prohibition should be denied, and the petition for Writ of Certiorari denied. If the Court hears the merits, it should frame the questions to be briefed so as to decide the serious underlying constitutional issues mentioned above.

Respectfully submitted,

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